In The
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-5030

MARGARET PAPACHRISTOU, et al.,

Petitioners,

v.

CITY OF JACKSONVILLE,

Respondent.

On Writ of Certiorari to the District Court of Appeal,
First District of Florida

RESPONDENT'S BRIEF

JAMES C. RINAMAN, JR.
Special Counsel

DAVID U. TUMIN
Assistant Counsel

J. EDWARD WALL
Assistant Counsel
1300 City Hall
Jacksonville, Florida 32202

T. EDWARD AUSTIN, JR.
State Attorney
Duval County Courthouse
Jacksonville, Florida 32202

Attorneys for Respondent

INDEX

TABLE OF AUTHORITIES

Page No.

Cases

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

Page No.

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

In The
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-5030

MARGARET PAPACHRISTOU, et al.,

Petitioners,

v.

CITY OF JACKSONVILLE,

Respondent.

On Writ of Certiorari to the District Court of Appeal, First District of Florida

---

RESPONDENT'S BRIEF

OPINIONS BELOW

The order of convinction entered by the Jacksonville Municipal Court and the order of the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, affirming the convictions are unreported. The opinion of the District Court of Appeal, First District of Florida, is reported in 236 So. 2d 141 (1st Dist. Fla. 1970).

JURISDICTION

The judgment of the District Court of Appeal, First District of Florida, was entered on June 9, 1970.

The jurisdiction of this Court to grant a writ of certiorari to the District Court of Appeal, First District of Florida, pursuant to 28 U.S.C. § 1257(3) is denied with reasons therefor contained in Point I of respondent's Argument.

ORDINANCES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions, statutes, and ordinances involved are the following:

Section 26-57
Jacksonville Ordinance Code

"Sec. 26-57. *Vagrants.*

"Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children, shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses. (Code 1942, ch. 33, § 42; Code 1953, § 27-48)".

Section 856.02,
Florida Statutes

"856.02 *Vagrants.*--Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling, or unlawful games or plays, common pipers and fiddlers, common drunkards, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, person who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and misspend what they earn without providing for themselves or the support of their families, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or tippling shops, persons able to work but habitually living upon the earnings of their wives and minor children, and all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness, shall be deemed vagrants, and upon convinction shall be subject to the penalty provided in § 856.03."

Fourteenth Amendment,
United States Constitution, Section 1

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1257

"§ 1257. *State courts; appeal; certiorari*

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Art. V, § 5(3)
Florida Constitution

"§ 5. District Courts of Appeal

"(3) *Jurisdiction.* Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees

except those from which appeals may be taken direct to the supreme court or to a circuit court.

"The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

"The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

"A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction."

Art. V, § 6(3)
Florida Constitution

"§ 6. Circuit Courts

"(3) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejectment, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original juris-

diction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

"The circuit courts and circuit judges shall have such extraterritorial jurisdiction in chancery cases as may be prescribed by law."

QUESTIONS PRESENTED

POINT I

WHETHER THE DENIAL OF CERTIORARI BY THE FLORIDA DISTRICT COURT OF APPEAL IS, WITHIN THE MEANING OF 28 U.S.C. § 1257, A FINAL JUDGMENT "RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD" AND, IF NOT, WHETHER THE WRIT ISSUED MUST BE QUASHED AS IMPROVIDENTLY GRANTED?

POINT II

WHETHER THE JUDGMENT OF THE FLORIDA DISTRICT COURT OF APPEAL MUST BE AFFIRMED IF BASED ON AN ADEQUATE STATE GROUND?

POINT III

WHETHER PETITIONERS HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE JACKSONVILLE VAGRANCY ORDINANCE AND THE FLORIDA VAGRANCY STATUTES IN THEIR ENTIRETY WHERE THE PETITIONERS WERE RESPECTIVELY CHARGED, TRIED, AND CONVICTED ONLY FOR BEING VAGRANTS WITHIN THE MEANING OF CERTAIN PROVISIONS OF THE JACKSONVILLE VAGRANCY ORDINANCE?

POINT IV

WHETHER PROVISIONS OF THE JACKSONVILLE VAGRANCY ORDINANCE ARE SEVERABLE?

POINT V

WHETHER THE JACKSONVILLE VAGRANCY ORDINANCE VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

Petitioners were convicted of vagrancy in the Jacksonville Municipal Court. On appeal to the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, the convictions were affirmed (App. 19). On petition to the District Court of Appeal, First District of Florida, for writ of certiorari, jurisdiction was declined and the petition dismissed (App. 39).

STATEMENT OF FACTS

The parties have stipulated to the statement of facts as presented in petitioners' brief under the heading Statement of Facts.

SUMMARY OF ARGUMENT

The writ of certiorari must be quashed since under applicable decisions of this Court the denial of certiorari by the Florida District Court of Appeal is not, within the meaning of 28 U.S.C. § 1257, a final judgment "rendered by the highest court of a state in which a decision could be had." See *American Railway Express Company v. Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923).

Assuming that this Court could review the denial of certiorari by the Florida District Court of Appeal, this Court must affirm the judgment inasmuch as it is based on an adequate state ground, the denial of certiorari, which may, under applicable Florida law, be granted only where the lower court lacked jurisdiction or departed from the essential requirements of the law with respect to the procedure followed. See *Edelman v. California*, 334 U.S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1953).

Moreover, petitioners lack standing to challenge the constitutionality of the Florida vagrancy statute since the constitutionality of the statute was not challenged in the lower courts.

Additionally, petitioners were charged, tried, and convicted for violating only certain provisions of the Jacksonville vagrancy ordinance and, thus, have standing to challenge only those provisions and not the entire ordinance. See *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 524 (1960).

Furthermore, the Jacksonville vagrancy ordinance is a severable ordinance and must be so examined, if examined at all, by this Court. See *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

In any event, the Jacksonville vagrancy ordinance is a valid police power measure designed to promote the health, safety, morals, and general welfare of our citizenry by checking the criminal process at its source, thus, protecting society by preventing the occurrence of violent crimes and benefiting those who might otherwise become irretrievably lost in a life of serious crime.

The ordinance is neither vague nor does it make "status" a crime, for in vagrancy cases, as in other criminal cases, the state must carry the burden of proving the acts which constitute the crime beyond a reasonable doubt.

Thus viewed, the Jacksonville vagrancy ordinance is a constitutional and vitally necessary exercise of the police power.

ARGUMENT

POINT I

THE WRIT OF CERTIORARI MUST BE QUASHED INASMUCH AS THE DENIAL OF CERTIORARI BY THE FLORIDA DISTRICT COURT OF APPEAL IS NOT, WITHIN THE MEANING OF 28 U.S.C. § 1257, A FINAL JUDGMENT "RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD."

It is elementary that this Court must quash a writ improvidently granted.

The present writ must of necessity be quashed inasmuch as it appears that it is directed to the Florida District Court of Appeal when this Court's previous holdings indicate clearly that when the District Court denied certiorari, the Florida Circuit Court became the "highest court of a state in which a decision could be had" within the meaning of 28 U.S.C. § 1257.

Under the Florida Constitution, the Circuit Courts have *final* appellate jurisdiction in all cases arising in Municipal Court. Art. V, § 6(3), Florida Constitution.

Prior to 1957, the Florida Supreme Court had jurisdiction to issue common law writs of certiorari. In 1957, by constitutional amendment, the Florida District Courts of Appeal were created and provided with certiorari jurisdiction. Art. V, § 5(3), Florida Constitution.

Shortly after this constitutional amendment, the Florida Supreme Court, in referring to the constitutional change in certiorari jurisdiction, held that the judgment of a Circuit Court, sitting in the exercise of its final appellate jurisdiction, was subject to certiorari review, not by the Supreme Court, but exclusively by the District Courts of Appeal. *Robinson v. State*, 132 So. 2d 3 (1961).

In the present case, petitioners were convicted in Municipal Court and, on appeal, the Circuit Court in exercising final appellate jurisdiction, affirmed petitioners' conviction.

Thus, it is apparent that the District Court of Appeal was the only Florida Court which could have granted certiorari to the petitioners, the Florida Supreme Court being precluded by the holding in *Robinson v. State*, supra, and the Florida Constitution.

In the case at bar, the District Court of Appeal, citing *State v. Smith*, 118 So. 2d 792 (Fla. App. 1st 1960), specifically recognized that under applicable state law a writ of certiorari can issue only where the inferior court has exceeded its jurisdiction or has not proceeded according to the essential requirements of the law and can not be used for the purpose of securing a second appeal on the merits. *Brown v. City of Jacksonville*, 236 So. 2d 141, 142 (1970).

Thus, acknowledging its limited certiorari jurisdiction, the District Court of Appeal, quite properly, dismissed petitioners' petition for writ of certiorari.

Petitioners now seek to have this Court review by certiorari the denial of certiorari by the Florida District Court of Appeal. Such a review is precluded by the numerous cases in which this Court has held that where review by the highest state court in which a decision *might* be had is discretionary and the state court, in its discretion, declines to take jurisdiction, the highest court which rendered judgment on the merits becomes the highest court of the state in which a decision *could* be had for the purpose of review by the United States Supreme Court.

See *Panhandle Eastern Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954); *Hammerstein v. Superior Court of California*, 341 U.S. 491, 71 S. Ct. 820, 95 L. Ed. 1135 (1951); *Adam v. Saenger*, 303 U.S. 59, 58 S. Ct. 454, 82 L. Ed. 649 (1938); *Chicago & E.I.R. Co. v. Industrial Commission*, 284 U.S. 296, 52 S. Ct. 151, 76 L. Ed. 304 (1932); *Western Union Telegraph Co. v. Priester*, 276 U.S. 252, 48 S. Ct. 234, 72 L. Ed. 555 (1928); *American Railway Express Company v. Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); *Randall v. Board of Commissioners*, 261 U.S. 252, 43 S. Ct. 252, 67 L. Ed. 637 (1923); *Norfolk & S. Turnpike*

Co. v. Virginia, 225 U.S. 264, 32 S. Ct. 828, 56 L. Ed. 1082 (1912); *Western U. Teleg. Co. v. Crovo*, 220 U.S. 364, 31 S. Ct. 399, 55 L. Ed. 498 (1911); *Missouri K. & T. R. Co. v. Elliott*, 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673 (1902).

As was ably stated by Mr. Justice Holmes, speaking for a unanimous Court in *American R. Express Co. v. Levee*, supra,

> ". . . under the Constitution of the state, the jurisdiction of the supreme court is discretionary (art. 7, § 11); and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther . . . when the jurisdiction was declined, the court of appeal was shown to be the highest court of the state in which a decision could be had."
>
> *American R. Express Co. v. Levee*, 263 U.S. at 20.

Moreover, Mr. Justice Holmes went on to point out that:

> ". . . Another section of the article cited required the supreme court to give its reasons for refusing the writ; and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration did not take from the refusal its obstensible character of declining jurisdiction."
>
> *American R. Express Co. v. Levee*, 263 U.S. at 21.

And in *Norfolk & S. Turnpike Co. v. Virginia*, supra, the Court unanimously announced in unequivocal terms that:

> ". . . from and after the opening of the next term of this court, where a writ of error is prosecuted to

> an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, unless it *plainly appears, on the fact of the record, by an affirmance in express terms* of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo* Case, and shall therefore, by not departing from the *face of the record*, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action." *Norfolk & S. Turnpike Co. v. Virginia* 225 U.S. at 269. (Emphasis supplied).

In the present case, as previously pointed out, by virtue of constitutional amendment and the ruling of the Florida Supreme Court in *Robinson v. State*, supra, the District Court of Appeal was the highest state court in which a decision *might* have been rendered. When, however, the District Court of Appeal declined jurisdiction and dismissed the petition for certiorari, the Florida Circuit Court became the highest state court in which a decision *could* be had within the meaning of 28 U.S.C. § 1257.

Accordingly, under the applicable decisions of this Court, above cited, this Court was without jurisdiction to issue a writ of certiorari to the Florida District Court of Appeal and must of necessity and in the interest of preserving its jurisdictional integrity quash the present writ as improvidently granted.

POINT II

THE JUDGMENT OF THE FLORIDA DISTRICT COURT OF APPEAL MUST BE AFFIRMED INASMUCH AS IT WAS BASED ON AN ADEQUATE STATE GROUND.

Assuming arguendo that this Court can review by certiorari the denial of certiorari by the Florida District Court of Appeal, the judgment of the District Court of Appeal must be affirmed inasmuch as there was an adequate state ground on which it was based. See *Edelman v. California*, 334 U.S. 357, 73 S. Ct. 293, 97 L. Ed. 387 (1953).

As previously shown, under applicable decisions of the Florida court, common law certiorari is properly granted only where the lower court lacked jurisdiction or in the procedure followed departed from the essential requirements of the law as defined by Florida law.

As observed by the Florida District Court of Appeal in declining jurisdiction in the case *sub judice*,

> ". . . The Circuit Court sitting as an appellate court did not exceed its jurisdiction and did not depart from the essential requirements of the law, but, on the contrary, properly followed the decision of the highest appellate court of this State, Johnson v. State, supra.
>
> *Brown v. City of Jacksonville*, 236 So. 2d 141 (1970) at p. 142; App. 41.

Thus, under this Court's well settled rules regarding the disposition of appeals and the avoidance of constitutional questions unless essential to a determination of the case, the decision of the Florida District Court of Appeal must be affirmed since it was based on an adequate state ground, the proper denial of certiorari under Florida law.

POINT III

THE PETITIONERS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE JACKSONVILLE VAGRANCY ORDINANCE AND THE FLORIDA VAGRANCY STATUTE IN THEIR ENTIRETY SINCE THE PETITIONERS WERE RESPECTIVELY CHARGED, TRIED, AND CONVICTED ONLY FOR BEING VAGRANTS WITHIN THE MEANING OF CERTAIN PROVISIONS OF THE JACKSONVILLE VAGRANCY ORDINANCE.

That the court will not formulate a rule of constitutional law broader than that required by the precise facts to which it is to be applied is a rule rigidly adhered to by this Court. *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 523 (1960). Accordingly, this Court has held that it will not consider the constitutionality of a portion of a legislative enactment at the instance of one whose interests are not affected by it. *Board of Trade v. Olsen*, 263 U.S. 1, 43 S. Ct. 470, 67 L. Ed. 839 (1923).

In the case at bar, the present petitioners were variously charged, tried, and convicted for violating the following sections of the Jacksonville vagrancy ordinance:

Papachristou Calloway Melton Johnson	Vagrancy - prowling by auto
Smith	Vagrancy - vagabond
Heath	Vagrancy - loitering Vagrancy - common thief
Campbell	Vagrancy - common thief
Brown	Vagrancy - disorderly loitering on street

Thus, the petitioners were charged with and convicted of specific violations under the ordinance and not with the violation of all of the provisions of the ordinance.

Petitioners have no standing to challenge the Florida vagrancy statute since this question was not raised in the lower courts and by petitioners' own admission "the statute is treated in this brief only because of its theoretical availability." (Petitioners' brief at p. 11)

It is respectfully submitted that this Court's long standing rulings concerning the limited scope of inquiry into the constitutionality of legislation and sound judicial discretion dictate that this Court's present investigation, if any, is restricted to a consideration of the sections of the ordinance which actually affect the present petitioners' interests, those sections with which they were charged and convicted.

POINT IV

THE PROVISIONS OF THE JACKSONVILLE VAGRANCY ORDINANCE ARE SEVERABLE AND MUST BE SO EXAMINED, IF EXAMINED AT ALL, BY THIS COURT.

It is elementary that a legislative enactment carries with it a presumption of constitutionality and that every presumption must be indulged in by this Court in favor of the law's constitutionality.

The burden of proving a law unconstitutional rests on the party alleging the law to be unconstitutional, *Metropolitan Casualty Insurance Company v. Brownell*, 294 U.S. 580, 55 S. Ct. 538, 79 L. Ed. 1070 (1935), and the law's unconstitutionality must be shown beyond a reasonable doubt. *James*

Everard's Breweries v. Day, 265 U.S. 545, 44 S. Ct. 628, 68 L. Ed. 1174 (1924).

As a natural corollary to the rule that a law is presumed constitutional, it is a cardinal rule of statutory construction followed by this Court on innumerable occasions, that where it is possible to examine a statute in its several provisions, this Court will do so. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031 (1942). Indeed, this Court has said that where a statute is severable, the Court has a *duty* to sustain the constitutional portions of the statute. *El Paso & N.E. R. Co. v. Gutierrez*, 215 U.S. 87, 30 S. Ct. 21, 54 L. Ed. 106 (1909).

Moreover, the duty to sever applies with equal force to criminal statutes. See *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

In ascertaining whether a statute or section thereof must stand or fall, the Court will look primarily to the intent of the Legislature in enacting the legislation under attack, and if, after separating the valid from invalid provisions of a statute, it may be presumed that the Legislature would have enacted the valid sections of the statute independent of the invalid, the Court will sustain the constitutional sections of the statute. *Champlin Refining Co. v. Corporation Co.*, 286 U.S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932).

The duty to separate valid from invalid provisions in criminal statutes was made abundantly clear in *United States v. Jackson*, supra, wherein this Court, in considering the constitutionality of the Federal Kidnapping Act, quoted with approval from *Chaplain v. Refining Co. v. Corporation Com.*, supra, and said:

"'The unconstitutionality of a part of an Act does

not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'"

United States v. Jackson,
390 U.S. at 585.

The Jacksonville vagrancy ordinance may be conveniently separated into eighteen definitions of vagrancy and examined as follows:

1. Rogues
2. Vagabonds
3. Dissolute persons who go about begging
4. Common gamblers
5. Persons who use juggling or unlawful games or plays
6. Common drunkards
7. Common nightwalkers
8. Thieves
9. Pilferers or pickpockets
10. Traders in stolen property
11. Lewd, wanton, and lascivious persons
12. Keepers of gambling places
13. Common railers and brawlers
14. Persons wandering or strolling around from place to place without any lawful purpose or object

15. Habitual loafers

16. Disorderly persons

17. Persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served

18. Persons able to work but habitually living upon the earnings of their wives or minor children.

POINT V

THE JACKSONVILLE VAGRANCY ORDINANCE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

As is demonstrated in petitioners' brief, people have felt the need for some form of vagrancy legislation since feudal times.

However, while petitioners' coverage of the derivation of vagrancy laws makes for interesting historical reading, what is important is not the laws' history but the laws' current relevancy and socially productive impact in today's modern society.

Imbedded in vagrancy legislation, perhaps more so than in any other form of criminal law, is the recognition that the actions or inactions of every man has an ultimate effect on every other man, for no man behaves or misbehaves in a vacuum.

Gone are the days when the nation was young, space plentiful, people few, and men were prone to strap a six-gun on their hip, load their stomachs with liquor, and become a law unto themselves.

In today's complex society, when the country's population has increased to more than two hundred million, an individualistic, do as you please, society is not only undesirable, but absolutely unthinkable if the nation is to endure.

It is with a view to preventing the more violent and socially destructive crimes by stopping the criminal process at its source that the framers of vagrancy legislation passed our vagrancy laws.

Deeply ingrained in vagrancy legislation is the recognition that the hard-core criminal, one capable of committing murder, rape, aggravated assault, and other crimes of violence, does not reach such a status as the result of a single act or by overnight metamorphosis but becomes so as the result of a gradual process of moral ond social deterioration.

As said by the Wisconsin Court in *Pollon v. State*, 261 N.W. 224 (1935), at p. 226, in affirming a conviction under a statute making a "common drunkard" a vagrant:

> ". . . There is no doubt that a person who has become violent or dangerous because of the excessive use of intoxicants can be restrained of his liberty. . . . There is no sound reason why, in the interest of the public welfare, the state may not seek to avoid such consequences by punishing a man given to the habitual use of intoxicating liquor in excess before he has reduced himself to a state of mind where he is no longer morally responsible."

It is also with a view to preventing the spread of vagrancy itself that our vagrancy laws were passed.

As the Washington Court observed in *State v. Harlowe*, 24 P.2d 601 (1933), at p. 603:

> "Society recognized that vagrancy is a parasitic disease, which, if allowed to spread, will sap the life of that upon which it feeds. To prevent the spread of the disease, the carrier must be reached. In order to discourage, and, if possible, to eradicate, vagrancy, our Legislature has enacted a statute defining vagrant persons and penalizing them according to its terms."

Vagrancy legislation, thus viewed, is a perfectly proper exercise of the police power inasmuch as it benefits society and promotes the general welfare in a variety of ways.

First, it protects the innocent and socially responsible person by preventing the more violent crimes from occurring.

Second, it aids the *developing criminal* by stopping the *criminal process* at its outset, giving the potentially dangerous criminal the chance to become rehabilitated before he commits some crime of violence from which neither he nor his victim can ever escape.

Moreover, the architects of our vagrancy laws have also recognized that the criminal law does more than simply provide punishment for criminal acts already committed, for then it is too late. The criminal law guides each member of society toward socially desirable conduct by distinguishing between socially acceptable and socially destructive behavior.

Our vagrancy laws serve as an *example* as much or more than as a deterrent or punitive force.

With the foregoing in mind, it is no wonder that while vagrancy laws existed at the common law in almost every state in the union, the people speaking through their elected

representatives in practically every state throughout our country have felt the necessity of having vagrancy legislation enacted. See 25 A.L.R.3d 792, 797 (1969).

It is also easily understood why the vast majority of courts which have considered the constitutionality of vagrancy legislation have sustained the validity of such laws as legitimate police power measures. See 25 A.L.R.3d 792, 798 (1969).

The need for vagrancy laws is further evidenced by the following partial list of cases in which courts throughout our country have upheld vagrancy legislation against constitutional attack:

State v. Starr, 113 P.2d 356 (Ariz. 1941)

Phillips v. Municipal Court of Los Angeles, 75 P.2d 548 (Cal. App. 1938)

Ex Parte Cutler, 36 P.2d 441 (Cal. App. 1934)

Ex parte McCue, 96 P. 110 (Cal. App. 1908)

Dominguez v. City and County of Denver, 363 P.2d 661 (Colo. 1961)

Ricks v. United States, 228 A.2d 316 228 A.2d 316 228 A.2d 316 (D.C. App. 1967)

Wilson v. United States, 212 A.2d 805, 336 F.2d 666

Hicks v. District of Columbia, 197 A.2d 154 (D.C. App. 1964)

Jenkins v. United States, 146 A.2d 444 (D.C. Mun. Ct. App. 1958)

Beall v. District of Columbia, 82 A.2d 765 (D.C. Mun. Ct. App. 1951)

Smith v. State, 239 So.2d 250 (Fla. 1970)

Johnson v. State, 202 So. 2d 852 (Fla. 1967)

Wallace v. State, 161 S.E. 2d 288 (Ga. 1968)

Ex Parte Clancy, 210 P. 487 (Kansas 1922)

Adamson v. Hoblitzell, 279 S.W.2d 759 (Ky. App. 1955)

City of New Orleans v. Postek, 158 So. 553 (La. 1935)

State v. McCormick, 77 So. 288 (La. 1918)

Steve v. McCorvey, 114 N.W.2d 703 (Minn. 1962)

Ex Parte Karnstrom, 249 S.W. 595 (Mo. 1923)

Ex parte Branch, 137 S.W. 886 (Mo. 1911)

Welch v. City of Cleveland, 120 N.E. 206 (Ohio 1971)

State v. Perry, 436 P.2d 252 (Ore. 1967)

City of Portland v. Goodwin, 210 P.2d 577 (Ore. 1949)

Ex parte Strittmatter, 124 S.W. 906 (Tex. Cr. App. 1910)

Morgan v. Commonwealth, 191 S.E. 791 (Va. 1937)

State v. Grenz, 175 P.2d 633 (Wash. 1947)

State v. Harlowe, 24 P.2d 601 (Wash. 1933)

Pollon v. State, 261 N.W. 224 (Wis. 1935)

It is fundamental that where the exercise of the police power is concerned, this Court will not second-guess the will of the people, as expressed through their Legislature, by attempting to determine whether the most expedient

means were used to accomplish the ends sought. On the contrary, this Court has a duty to uphold a police power measure if it bears some rational relationship to the health, safety, morals, or general welfare, and the means employed reasonably accomplish the desired purpose. *Johns v. City of Portland*, 245 U.S. 217, 38 S. Ct. 112, 62 L. Ed. 252 (1917).

It is submitted that no only does the ordinance here challenged bear a *reasonable* relationship to the general welfare of society but that the ordinance bears a *direct* relationship and is absolutely essential to the promotion of the health, safety, and morals of our citizenry.

The primary thrust, however, of petitioners' attack on the Jacksonville vagrancy ordinance is that the ordinance is void for vagueness.

The Florida Supreme Court has twice held the Florida vagrancy statute, which is, in its essential terms, traced by the Jacksonville vagrancy ordinance, constitutional against the claim that the statute was void for vagueness. *Smith v. State*, 239 So. 2d 250 (Fla. 1970); *Johnson v. State*, 202 So. 2d 852 (Fla. 1967).

As this Court pointedly observed in *United States v. Petrillo*, 322 U.S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947), at p. 7, in an opinion delivered by the late Mr. Justice Black ". . . the Constitution does not require impossible standards" and due process is complied with where a statute ". . . provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of [the legislature]."

Furthermore, as Mr. Justice Black astutely pointed out:

". . . That there may be marginal cases in which it is

> difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." ibid.

Moreover, in *Winters v. New York*, 333 U.S. 507 68 S. Ct. 665, 92 L. Ed. 840 (1948), this Court said in no uncertain terms that it would go ". . . far to uphold state . . . statutes that deal with offenses difficult to define . . ." and ". . . only a *definite conviction*" by the Court that the Fourteenth Amendment has been violated " . . . justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute." *Winters v. New York*, 333 U.S. at 517. (Emphasis supplied)

This Court has held the following words *not* unconstitutionally vague:

> (Obscene, lewd, lascivious, or indecent material)
>
> *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).
>
> (Exposing citizens to derision or obloquy)
>
> *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952).
>
> (So far as practical)
>
> *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 72 S. Ct. 329, 96 L. Ed. 367 (1952).
>
> (Loud and raucous noises)
>
> *Kovacs v. Cooper*, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513 (1949).

(In excess of number employees needed)

United States v. Petrillo, supra.

(Undesirable residents)

Mahler v. Eby, 264 U.S. 32, 44 S. Ct. 283, 68 L. Ed. 549 (1924).

Can it be said that the foregoing words meet the test of constitutional due process and yet said with the "definite conviction" spoken of in *Winters*, that those here attacked by petitioners do not?

It is submitted that the words "obscene, lewd, lascivious, and indecent" specifically held constitutionally precise by this Court in *Roth v. United States*, supra, correspond directly with the words "dissolute" and "lewd, wanton, and lascivious" as found in the Jacksonville vagrancy ordinance.

How can the same words be found constitutionally definite in *Roth* but unconstitutionally vague in this case?

As the California Court observed in *Ex parte McCue*, 96 P. 110 (S.D. Cal. 1908), at p. 111:

> "One charged . . . with being an idle, lewd, and dissolute person, is sufficiently advised of the character of his offense. To say that the Legislature must specify the many evil and corrupt practices which might constitute one a lewd or dissolute person would often render the enforcement of a police regulation in connection therewith impossible, and this without considerating the indelicacy and impropriety of expression which would often be necessary."

And what is vague or indefinite in the words "persons wandering or strolling around from place to place without any lawful purpose or object"?

As was said by the Oregon Supreme Court in *City of Portland v. Goodwin*, 210 P.2d 577 (Ore. 1949), at p. 582:

> ". . . We are unable to conceive of a sane person roaming or being upon the street late at night without some purpose though it may be only for the purpose of going to or from his home or walking in the fresh air. . . . The words 'without having . . . a lawful purpose' are the exact equivalent of the words 'having an unlawful purpose.'
>
> "Statutes which make the absence of lawful purpose or the presence of an unlawful purpose an element of a statutory offense are many, and the constitutionality of such enactments has been repeatedly upheld."

Furthermore, when the constitutionality of the statute here assailed was previously raised before this Court in *Johnson v. Florida*, 931 U.S. 596, 88 S. Ct. 1713, 20 L. Ed. 2d 838 (1968), this Court, in declining to hold the Florida statute unconstitutional, stated that:

> ". . . The essential ingredients of the crime charged were 'wandering or strolling around from place to place without any lawful purpose or object.' *The fact that the [defendant] was on probation with a 10 p.m. curfew and out long after that hour may be held to establish that ingredient of the crime of no 'lawful purpose or object.'*"
>
> *Johnson v. Florida*
> 391 U.S. at 598
> (Emphasis supplied)

As was ably put by Mr. Justice Clark, speaking for the Court in *Boyce Motor Lines v. United States*, supra,

> ". . . few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes periously close to an area of proscribed conduct shall take the risk that he may cross the line."
>
> *Boyce Motor Lines v. United States*, 342 U.S. at 340

Petitioners claim that the legislation attacked is unconstitutional in that it makes criminal "involuntary conditions or status of life" is equally unmeritorious. Petitioners rely on *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). In *Robinson*, however, the defendant was convicted of being addicted to the use of narcotics. The Court found narcotic addiction to be a "disease" which might be contracted innocently or involuntarily and held making narcotic addiction a crime cruel and unusual punishment. Thus, it was the making of a "disease" criminal which the Court found objectionable in *Robinson* and not the making of a status per se. Even a casual perusal of the ordinance here attacked will reveal that none of the prohibitions found therein can be classified as a "disease."

Moreover, none of the types of vagrants specified therein can reasonably be said to be so involuntarily. Certainly, for

example, there is nothing involuntarily in becoming a "common thief."

To say that "common thieves," "common brawlers," "pickpockets," or "traders in stolen property" are so because of circumstances beyond their control necessitates that one stretch his reason to its philosophical limits. Furthermore, to adopt such reasoning and to say no criminal responsibility can be predicated thereon, would emasculate much, if not all, of the criminal law.

In any event, the Florida Supreme Court has recently admonished that:

> ". . . Persons should not be charged with vagrancy unless it is clear they are vagrants of their own volition and choice. Innocent victims of misfortune obstensibly appearing to be vagrants, but who are not such either by choice or intentional conduct should not be charged with vagrancy."
>
> *Headley v. Selkowitz,*
> 171 So. 2d 368, 370 (Fla. 1965)

Thus, the Florida courts will safeguard against an abuse of vagrancy legislation by interpreting the vagrancy law to require that the proscribed conduct be volitional.

Moreover, petitioners overlook the fact that the distinction between crimes of action and crimes of status is, upon scrutiny, tenuous, inasmuch as one does not achieve a "status" without first committing a series of "acts" which are prerequisite to the attainment of the status. As observed by the Washington Court in *State v. Harlowe*, 24 P.2d 601 (Wash. 1933), at p. 604:

> ". . . to charge appellant as being a vagrant under

> this particular subdivision of the statute [lewd, disorderly and dissolute persons] was not merely to charge her with a state of being, but was rather to charge her with a course of conduct made up of continued and related acts."

Through the premeditated, deliberated killing of another human being one achieves the "status" of a murderer; yet it would be ludicrous to argue that one could not be prosecuted for attaining such a status on the basis that to do so would be to make criminal a "status of life."

Moreover, it is doubtful that any court would strike down a statute making it a crime for anyone to "commit murder" as being unconstitutionally vague or for making status a crime since the meaning of "murder" is commonly understood."

The burden in vagrancy cases, as in all criminal cases, is upon the state to prove beyond a reasonable doubt that the accused has committed the acts which constitute the crime, whether, for example, they be acts which constitute one a "lewd, wanton, and lascivious" person or acts which constitute one a person "neglecting all lawful business and habitually spending [his] time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served."

Petitioners also contend that the instant legislation is unconstitutional in that it requires people to offer an account of themselves, citing as authority *Ricks v. District of Columbia*, 414 F.2d 1097 (1968). In *Ricks*, however, the Court did not consider the question of whether the requirement that the accused give an account of himself violated constitutionally protected rights but found only that the statutory words "good account" were unconstitutionally vague. Re-

spondent has previously dealt with the issue of vagueness, and, in any event, there is no requirement in the ordinance that one give an account of himself. The burden, as pointed out above, is on the state to prove a statutory violation beyond a reasonable doubt.

While the statute challenged by petitioners herein was found unconstitutional in *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969), it is essential to note that the defendant in *Lazarus* was charged only with the "wandering or strolling" and "continuous employment" provisions of the statute, and it is submitted that the Court erred in holding the entire statute unconstitutional, especially in view of the fact that the Court itself took notice of the fact that ". . . there may be some valid segments to this statute." *Lazarus v. Faircloth*, supra, at p. 273.

Furthermore, and of still greater significance, is the fact that this Court has recently vacated the judgment in *Larazus* and remanded to the District Court with the direction that the Court reconsider the case in the light of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). *Shevin v. Lazarus*, 401 U.S. 987, 91 S. Ct. 1218, 28 L. Ed. 2d 524 (1971).

In *Younger v. Harris*, supra, in an opinion delivered by Mr. Justice Black, the Court speaks of a

> ". . . proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "our Federalism," and one familiar with the profound de-

bates that ushered our Federal Constitution into existence is bound to respect "those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."

While *Younger* and *Lazarus* involved the enjoining of state criminal prosecutions, it is submitted that the rationale behind the language quoted from *Younger* applies with equal force to the present case.

The time is here, and the need never greater, for this Court to strike a proper balance between state and federal judicial concerns and the above words of Mr. Justice Black should forever ring loud throughout our court system.

The time has also come when this Court, while never wavering from its duty to protect individual rights, should endeavor to establish a workable balance between the rights of the individual and those of society.

It is respectfully submitted that during these times, when crime is rapidly rising, to find the challenged legislation un-

constitutional on its face would be to throw "judicial handcuffs" around our law enforcement personnel and it is suggested that any unconstitutional application of the City's vagrancy law that may occur can be corrected in the proper state judicial tribunal on a case by case basis.

CONCLUSION

For the foregoing reasons, the writ of certiorari must be quashed or the judgment below affirmed.

Respectfully submitted,

/s/ James C. Rinaman, Jr.

JAMES C. RINAMAN, JR.
Special Counsel

/s/ David U. Tumin

DAVID U. TUMIN
Assistant Counsel

/s/ J. Edward Wall

J. EDWARD WALL
Assistant Counsel
1300 City Hall
Jacksonville, Florida 32202

/s/ T. Edward Austin

T. EDWARD AUSTIN, JR.
State Attorney
Duval County Courthouse
Jacksonville, Florida 32202

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing brief of respondent has been furnished to Samuel S. Jacobson, Esquire, 320 First Bank & Trust Building, Jacksonville, Florida 32202, attorney for petitioners; and Honorable Robert L. Shevin, Attorney General, State of Florida, The Capitol, Tallahassee, Florida, by United States mail, this 7th day of October, 1971.

/s/ J. Edward Wall

Attorney